Supreme Court, U.S.
FILED
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91-2023
NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

OLA ALLEN, PH.D., PETITIONER

VS.

E. C. SHRUM, ETAL, RESPONDENTS

PETITION FOR WRIT OF

CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX 1

OLA ALLEN, Ph.D.
PRO SE
P. O. BOX 6706
LONGVIEW, TX 75608

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4591
Summary Calendar

OLA ALLEN,

Plaintiff-Appellant,

VERSUS

E.C. SHRUM,
SUPER ONE SUPERMARKET,
and
KATHY R. OGLE,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas
(91 CV 42)

(February 13, 1992)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:

Ola Allen appeals the dismissal of her civil rights action brought pursuant to 42 U.S.C. § 1983. Finding no error,

we dismiss the appeal as frivolous.

I.

Allen filed this action against E.C. Shrum, Super One Supermarket (Super One), and Kathy R. Ogle seeking $50 million dollars from each defendant for actual and punitive damages. She alleged that the defendants caused severe personal injuries to her in three separate accidents, that she had sued them in the Texas state courts, and that her suits had been dismissed improperly by the state court judges "because of her race, color, and sex."

The district court dismissed the case as barred by the Texas statute of limitations for section 1983 actions as to one claim and the principle of res judicata as to all three claims. The court found that Allen's claims against defendants had already been disposed of

by final Texas state court judgments. The court found that Allen's suit was frivolous and sanctioned her by ordering that she secure permission from the court before filing any new cases.

II.

A.

Super One argues that this appeal should be dismissed because Allen's notice of appeal did not comply with Fed. R. App. P. 3(c) in that it did not designate the judgment or order from which Allen intended to appeal. Rule 3(c) provides that the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order or part appealed from; and shall name the court to which the appeal is taken. Allen's notice does name the parties and the court, but Super One is correct that it does not specifically

name the judgment or order. However, we construe this part of the rule broadly and will not dismiss an appeal if it is evident which judgment the appellant is appealing. Osterberger v. Relocation Realty Serv. Corp., 921 F.2d 72, 73-74 (5th Cir. 1990). It is plain from her brief that Allen intended to appeal the judgment dismissing her case, so the appeal should not be dismissed. See Cates v. International Tel. & Tel. Corp., 756 F. 2d 1161, 1173 n.18 (5th Cir. 1985).

B.

Although Allen's complaint does not specifically state that she is proceedingt under section 1983, if we give her pro se complaint a liberal construction, it can be interpreted as seeking relief under section 1983, as she claims discrimination on the basis of her

race, color, and sex. Allen's claim appears to be that she believes that her state tort actions against defendants were dismissed by the state court judges because she is black. She sued Shrum and Ogle for damages arising out of two car accidents, and she sued Super One for detaining her for shoplifting.

The suits against Shrum and Super One were dismissed with prejudice because Allen failed to comply with the defendants' discovery requests, and the suit against Ogle was dismissed on a motion for directed verdict at the close of Allen's case. Unhappy with the outcome of these cases, she is attempting to sue the defendants in federal court for damages arising out of the same incidents that were the subject of her state court suits.

"Litigants may not obtain review of

state court actions by filing complaints about those actions in lower federal courts cast in the form of civil rights suits." Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986); see also Brinkmann v. Johnston, 793 F.2d 111, 113 (5th Cir. 1986). Allen attempted to phrase her complaint in the language of a civil rights suit by making allegations of a conspiracy between the defendants, their attorneys, and the state court judges to deprive her of her day in court and her right to just compensation for her injuries because she is black.

Although the named defendants are private and not state actors, private acts or conduct may give rise to liability under section 1983 if the individual is a willing participant in joint action with the state or its agents. Hale, 786 F.2d at 690. Allen's

complaint fails to allege any factual basis to support her conspiracy claims. In section 1983 cases, we require the plaintiff to state specific facts, not merely conclusory allegations. Id. Because Allen alleges no facts, her complaint does not state a section 1983 claim. Her suit is merely an attempt to obtain review of her state court actions, which is prohibited. The district court correctly dismissed this action.

C.

The district court found that Allen had violated Fed. R. Civ. P. 11 and sanctioned her by imposing a preclusion order against filing future lawsuits unless she receives permission of the court. The court noted that she had been sanctioned twice already in Actions TY-82-49-CA (no new motions without leave of court) and TY-90-321-CA ($100). Allen

argues that the district court could have sanctioned her, but should not have done so in this manner.

A district court's imposition of sanctions under rule 11 is reviewed for abuse of discretion. Thomas v. Capital Sec. Servs., 836 F.2d 866, 871-73 (5th Cir. 1988) (en banc). The district court did not abuse its discretion in sanctioning Allen. Allen's complaint was not well grounded in fact and was not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. See id. at 870; rule 11.

The district court has discretion in determining what type of sanction to impose; however, the court should utilize the sanction that furthers the purpose of rule 11 and is the least severe sanction adequate to such purpose. Thomas, 836

F.2d at 878. We have approved the use of court orders prohibiting a plaintiff from filing new complaints without permission of the court. See Mayfield v. Klevenhagen, 941 F.2d 346, 347-49 (5th Cir. 1991); Farguson v. MBank Houston, N.A., 808 F.2d 358, 360 (5th Cir. 1986). The district court's order prohibiting Allen from filing any new complaints unless she first receives permission of the court was warranted. Previously imposed monetary sanctions evidently have been ineffective to curb Allen's penchant for filing baseless pleadings. She is a repeat frivolous litigator, and there is no hint of improper motive in the district court's order.

Super One has made a motion to this court for sanctions against Allen pursuant to Fed. R. App. P. 38. Super One seeks double costs and attorneys'

fees. Rule 38 authorizes this court to impose sanctions on an appellant who pursued a frivolous appeal. McAfee v. 5th Circuit Judges, 884 F.2d 221, 223 (5th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).

We have not yet warned Allen of the possibility of sanctions, nor is an appeal of the particular sanction imposed necessarily frivolous. However, although we show significant forbearance in imposing sanctions on pro se litigants, Allen's history in the Tyler division shows that more than a mere warning is needed to get the message across to her that she cannot continue to file frivolous lawsuits, and pursue meritless appeals, at great cost to defendants and the court. Cf. Brinkmann, 793 F.2d at 113, McAfee, 884 F.2d at 223 (warning litigants against future frivolous

lawsuits). Addititonally, her brief to this court is replete with references to the effect that the district judge and the magistrate judge ruled as they did because of racism. She does not advert to the basis of the district court's ruling or seriously challenge the sanction imposed. Accordingly, we assess double costs, on appeal, against Allen and warn her that further frivolous actions can subject her to more severe sanctions, such as payment of reasonable attorneys' fees.

D.

Allen argues that District Judge Steger and Magistrate Judge Guthrie should have recused themselves from her case because they could not be fair to her because of her race, color, and sex.

Allen filed several motions requesting all district court judges to

recuse themselves except Judge William Wayne Justice. Judge Justice promptly recused himself. Allen also filed a motion rescinding her first motion for recusal in which she stated that she believed that Judge Steger would be fair to her.

Even if her motion rescinding her motion to recuse were not enough to dispose of this issue, Allen has not alleged any facts to support her charges that the judges were unfair, biased, or prejudiced in any way. See 28 U.S.C. § 144. There is nothing in the record to suggest that Judge Steger's or Magistrate Guthrie's impartiality might reasonably be questioned. See U.S.C. § 455(a). A recusal motion is committed to the sound discretion of the district judge. United States v. Wade, 931 F.2d 300, 304 (5th Cir.), cert. denied, 112 S. Ct. 247

(1991). The district court judge and magistrate judge did not abuse their discretion in not recusing themselves.

The appeal is DISMISSED as frivolous. See Fifth Cir. Loc. R. 42.2.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-2059

Summary Calendar

Franklin ALLEN and Ola Mae Allen,

Plaintiffs-Appellants,

v.

Sidney W. CLYBURN, Longview Police Department, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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(September 1, 1983)

Before GEE, RANDALL and TATE, Circuit Judges.

Per Curiam:

The plaintiffs, Franklin and Ola Mae Allen, allege that the defendants conspired to prevent them from living in

the home of their choice. The district court granted summary judgment for defendants Sidney W. Clyburn and Longview Savings and Loan Association and refused to allow the plaintiffs to add the City of Longview as an additional defendant. The plaintiffs appeal, but we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The Allen's original pro se complaint named only Clyburn and Longview Savings as defendants. The complaint states that the Allens constracted with Clyburn to have him build a $158,000 house for them, but that "[a]lthough said contract referred to and included plans and specifications for the construction of improvements on said property, there were, in fact, no specifications ever agreed to by Plaintiffs and between Plaintiffs and Defendants named herein." Clyburn allegedly built the house not to

the Allens' specifications but to his own, allegedly because the Allens are black and he is white. The complaint also states that Clyburn told the Allens that every item they asked for would cost extra.

The Allens had applied to Longview Savings for financing. According to the complaint, Longview Savings, acting in concert with Clyburn, denied them a loan because they were black. Further, although the Allens had complained to Longview Savings about their problems with Clyburn, it never took any action to protect them.

The complaint further alleges that Clyburn conspired with "every Law Enforcement Agency in . . . Longview . . . execpt the Texas Rangers" to discriminate against the Allens, who were arrested seven times because of their

color. The Allens also claim that they cannot obtain legal counsel because of their race, although four paragraphs later the complaint refers to an attorney retained by the Allens. The complaint seeks damages; the only reference to the law under which relief is sought is a reservation of "the right to plead further under The Civil Rights Act of 1866, . . ., The Fourteenth Amendment . . ., The Civil Rights Act of 1968 -- Title 8 -- Fair Housing and The City Ordinance of Longview, Texas #1286 . . . ."

Longview Savings and Clyburn moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b) (6). An affidavit from the president of Longview Savings was attached to both motions. The affidavit stated that the complaint was totally in error: Longview Savings

had not denied the Allens a loan, but on the contrary had approved a one-year commitment to make the loan. The Allens simply never came in to complete the deal, although Longview Savings sent them a reminder when the commitment was about to expire. The affidavit averred that Longview Savings remained willing to lend the Allens money at current market rates.

The Allens filed a variety of responses to the motions to dismiss. The responses essentially reiterated the claims of the complaint; the Allens filed no affidavits.

Ola Mae Allen did, however, file an "Amended Petition," evidently intended to supplement rather than to replace the original complaint. The amended complaint named only the City of Longview as a defendant and only Ms. Allen as a plaintiff. In the complaint, she claimed

that the Longview Police Department had conspired with Clyburn to harass and intimidate her because of her color. The most specific factural allegation was that the police had "intimidated, interfered with me by threat and force arresting and fining me for Sidney W. Clyburn . . . ."

The district court ordered that the motions to dismiss be considered as motions for summary judgment, and allowed ten days for the filing of affidavits, responses, and briefs. The Allens filed no affidavits, but instead submitted letters written to them by the Department of Housing and Urban Development. The letters acknowledged that the Allens had filed housing discrimination complaints with HUD and offered assistance through informal negotiations to work out the problems. The Allens also submitted a

notice of lis pendens from a state-court suit Clyburn had filed against them over the house. The district court granted the summary judgment motions and "dismiss[ed] with prejudice the petition of plaintiffs."

Meanwhile, the City of Longview had filed a motion for severance on the ground that the suits against it and against Longview Savings were based on unrelated occurrences and that the plaintiffs had never made the requiste motion to add the City as a defendant. The district court declined to sever the cases, since the plaintiffs had not moved under Federal Rule of Civil Procedure 21 to add the City and there was thus no case against it that could be severed. The district court also expressly refused to add the City as a defendant.

The Allens appeal. On appeal, they

claim only under sections 804, 805, and 901 of the Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3605, 3631 (1976), and under the ordinance of the City of Longview. We will explain why the district court's judgment was correct; we will also deal specifically with the various points that the Allens raise.

II. THE POLICE DEPARTMENT.

The Allens never moved for permission to add the City as a defendant. Federal Rule of Civil Procedure 21 provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and upon such terms as are just." (Emphasis added). In another case in which the plaintiffs sought to amend their complaint to add a new defendant, the court said that "it is within the sound

judicial discretion of the trial court to decide, under the facts and circumstances of the case, whether or not it will permit a new party, plaintiff or defendant, to be brought into the action." Crews v. Blake, 52 F.R.D. 106, 107 (S.D. Ga. 1971). The Allens simply never asked the court to consider adding the City.

Further, even if we viewed the amended complaint as a motion to add a defendant, we would see no abuse of discretion in the district court's refusal to grant it. The only connection between the two claims was that each involved a conspiracy with Clyburn to discriminate against Ola Mae Allen. The alleged acts of discrimination were wholly unrelated; Ms. Allen never charged that the City conspired with Longview Savings. It was not necessary to try the

claims together, nor would there have been any particular economy in doing so.

The Allens do not dispute any of this analysis. Instead, they rely on the Omnibus Order for handling the case that the district court entered on November 5, 1982. The two sections of the order that the Allens cite read as follows:

> 1. Any motion to implead third parties or to join additional parties under Rules 14 or 19, F.R.CIV.P., respectively, shall be filed by the present parties to this civil action, within ten days after receipt of a copy of this order.
>
> . . . .
>
> 8. Leave is granted to plaintiffs to file amended pleadings by January 26, 1983.

The Allens filed their amended complaints on November 16, 1982, presumably within ten days of their receipt of the Omnibus Order and unquestionably before January 26, 1983.

This order, however, does not help

the Allens. They filed an amended complaint, not a motion under rule 14 or 19. Even if the complaint were treated as a motion, it was not made under rule 14 or 19, since it was a direct claim rather than a third-party claim (rule 14) and the City was not an indispensable party (rule 19). Further, section 1 of the order did not guarantee that such motions would be granted.

While the order does permit the filing of amended complaints before January 26, 1983, it clearly cannot refer to complaints that add new defendants. If it did, it would override the ten-day limit in section 1 of the order. The order also provides that discovery must be completed by January 24, 1983. If a plaintiff could freely add defendants until January 26, it would be possible to add a defendant on January 25, after the

end of the discovery period. Similarly, the order sets dates for a pretrial order and conference that are too soon after January 26 for any defendant brought in at the amendment deadline to meet. And finally, of course, if the order were inconsistent with the Federal Rules of Civil Procedure, the rules would govern. Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature . . . .").

The Allens never moved to add the City as a defendant, and the district court did not abuse its discretion in refusing to add the City. We therefore affirm the district court's order that the City not be considered a party.

III. LONGVIEW SAVINGS.

Longview Savings moved for dismissal for failure to state a claim. The court

converted the motion to one for summary judgment. Longview Savings filed an affidavit by its president that it had not denied the Allens a loan and that it had not conspired with Clyburn.

> Federal Rule of Civil Procedure 56(e) requires that [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The only submission that the Allens even contend showed a factual issue was the correspondence from the Department of Housing and Urban Development. There is notheing in the letters that demonstrates a factual issue; the letters do not state any facts at all. The Allens appear to

believe that HUD's offer to participate in conciliation discussions indicates that HUD had found that Clyburn and Longview Savings had violated the law. The letters do not state any such finding. Further, the statute providing for conciliation states that "[n]othing said or done in the course of [conciliation attempts] may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned." 42 U.S.C. § 3610(a) (1976). This suit is an action under that subchapter. The Allens seek relief under 42 U.S.C. §§ 3604, 3605, and 3631. The letters are therefore not competent evidence.

Summary judgment is only appropriate when, viewing the facts in the light most favorable to the nonmovant, there is no

genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Because the Allens did not file an appropriate response, the facts here are those established by the affidavit of Longview Savings' president. Longview Savings did not deny the Allens a loan or conspire with Clyburn to prevent them from buying the house they wanted.

The Allens allege only one other act of discrimination by Longview Savings: its failure to prevent Clyburn from discriminating against them. The affidavit does not address this issue, so we review it as a motion to dismiss for failure to state a claim. See 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2722 at 46 (1983). Such a motion may be granted only if it appears form the face of the

complaint that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Under this standard, the Allens' claim must fail, for the savings and loan had no legal duty to attempt to influence Clyburn. Longview Savings is thus entitled to judgment as a matter of law on all of the Allens' claims, and we accordingly affirm the district court on that point.

IV. CLYBURN.

Clyburn's motion for summary judgment was supported only by the Longview Savings affidavit. The Allens filed no response other than the HUD letters discussed above, the lis pendens notice, and various unsworn motions and responses that reiterated the allegations of the complaint. As discussed above in part III, the Longview Savings affidavit

establishes that Clyburn did not conspire with the savings and loan.

The complaints, however, also alleges discrimination by Clyburn acting alone and with various law enforcement agencies. Since he, like the Allens, has provided no affidavit or other source of facts on this issue beyond the pleadings, we once again use the standard for a motion to dismiss for failure to state a claim. See part III, supra.

It is clear from the complaint that the Allens are not entitled to relief. The only discriminatory action allegedly taken by Clyburn alone was his building the house to his own specifications. The Allens admit in their complaint that they never agreed with Clyburn on any specifications. The contract, included in the complaint, refers to specifications only in a statement that

those not described in an attachment to the contract will be at extra cost. There is no attachment setting forth any included specifications. Under these circumstances, it was not wrongful, let alone a violation of federal law, for Clyburn to refuse to follow the Allens' requests. He simply had no duty to do otherwise.

In reviewing the allegation that Clyburn conspired with the police, we look only to the original complaint. The amended complaint contained more specific allegations, but it only named the City as a defendant. Since the amended complaint did not name Clyburn as a defendant, it did not purport to allege any additional facts against him, and we decline to construe it as having done so.

The entire allegation in the original complaint is that "Defendant --

Sidney W. Clyburn furthered 'Racial Discrimination' upon and against Plaintiffs with every Law Enforcement Agency in the City of Longview, County of Gregg; except the Texas Rangers. Plaintiffs were arrested seven times because of our Race and Color." We read pro se complaints liberally. Barksdale v. King, 699 F.2d 744, 746 (5th Cir. 1983). So viewed, this portion of the complaint alleges a conspiracy to arrest and repeated arrests of the Allens because they were black. This may state a cause of action, but not under the housing discrimination laws relied on by the plaintiffs. Section 901, 42 U.S.C. § 3631, is a criminal statute, not one providing a private civil action. Section 805, 42 U.S.C. § 3605, relates solely to discrimination in the financing of housing; the allegation of police

harassment does not mention financing.

The Allens arguably might have stated a claim under section 804, 42 U.S.C. § 3604, if they had alleged that the purpose of the arrests had been to prevent them from purchasing the house. Our liberal attitude toward pro se complaints, however, does not permit us to supply facts not pleaded by the plaintiffs, and the complaint is simply devoid of amy statement that the alleged conspiracy with the police was in any way related to the sale of the house. The Allens thus also failed to state a claim under section 804.

We thus find that the Allens have stated no federal claim against Clyburn. This leaves the question whether the Allens have stated a claim under the Longview ordinance. The district court decided the question on the merits; its

decision to do so has not been challenged, and was in any event within its discretion given the similarities in the laws and the identity of the facts. See 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3567 (1975).

As discussed above in relation to federal law, Clyburn's individual actions were not wrongful. There is nothing in the ordinance to change that result. He still had no duty to accommodate the Allens' choice of specifications.

This leaves the allegation of conspiracy with the police. Section 3 of the ordinance is an almost word-for-word reproduction of section 805 of the federal law, and like it deals only with discrimination in the financing of housing. Section 2 of the ordinance is a similar reproduction of section 804 of

the federal law, so the Allens' failure to allege that the conspiracy related to the sale of the house is fatal. That failure also precludes statement of a cause of action under section 9 of the ordinance, which makes it unlawful to harass any person for exercising his rights under the ordinance. The district court thus properly dismissed the claims under the ordinance, as well.

V. CONCLUSION.

We conclude that the Allens never moved to add the City of Longview as a defendant, and that the district court did not abuse its discretion in denying joinder. Further, the Allens made no factual response to the Longview Savings affidavit, and the affidavit was enough to entitle the savings and loan to summary judgment on all claims. The conspiracy claim against Clyburn was

disposed of by the Longview Savings affidavit. Finally, the complaint stated no claim, under either the federal housing laws or the Longview ordinance, against Clyburn for his individual actions or for his alleged conspiracy with the police. We therefore AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-4668

OLA ALLEN,

Plaintiff-Appellant,

versus

CITY OF LONGIVEW,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(Dec. 30, 1991)

Before POLITZ, KING and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee ( ) to dismiss the appeal is

granted.

MEMORANDUM U.S. Department of Housing and Urban Development

TO: Leonard Chaires, Director, Office of Regional Fair Housing and Equal Opportunity, 6E

DATE: July 29, 1982

IN REPLY REFER TO:

FROM: Fernando Reyes, 6ES

SUBJECT: Final Investigation Report - Case File No. 06-82-06-456-200 Ola Mae Allen vs. Sidney Clyburn - Longview, Texas

A. Issue:

Whether or not the complainants' (Ms. Ola Mae Allen and Mr. Franklin Allen) were discriminated against in their attempt to construct and purchase a single family dwelling because of their color (Black) in violation of the Civil Rights Act of 1968 Title VIII Section 804(a)(b)(c)(d), financing and other.

B. Background:

The City of Longview, Texas, in which the alleged discriminatory act occurred, is located in the County of Gregg in northeast Texas and is considered the populous triangle of Shreveport, Dallas and Houston. The city itself encompasses 35 square miles while the county encompasses a total of 282 square miles.

The total population of Gregg County consists of 101,498 (1982 est.) of which 67,000 people (1982 est.) are situated in Longview, Texas. A breakdown by racial group indicates that at present there are 79,806 White, 17,807 Blacks, 2,011 Hispanics and 1874 Other.

A review of housing information taken from the City Chamber of Commerce indicates that a house of good construction, brick veneer, concrete slab

floors, and copper plumbing may be built for an average of $55 per square foot plus the lot. There are home sites with acreage available within 5 miles of town. Convenient and modern apartments, duplexes, condominiums and patio homes are scattered through the city.

There appears to be no Federal funds involved in the building of this house. According to the respondent, there are no Federal funds involved in any of the homes he builts since he is considered to be a custom home builder.

It should be noted that this case was reopened under Case File Number 06-82-06-456-200. A prior investigation conducted by Mr. William Maddox, an investigator within the office of Fair Housing and Equal Opportunity was conducted under Case File Number 06-82-12-127-200 and a determination of not to

resolve was made. The case was reopened based on a recommendation of Mr. Angeles Ramos, Title VIII Branch Chief, because the complainant introduced additional information which may have been overlooked during the first investigation. The case was thus reopened under Section 810(b) which provides that "Complaints may be reasonably and fairly amended at anytime".

Interview with Complainant:

The complainants (Ms. Ola Mae Allen and Mr. Franklin Allen) were interviewed on June 15, 1982 at their residence, 1500 West Fairmont, Apartment #13, Cluster Apartments, located in Longview, Texas. A lengthy interview, which lasted for approximately 9 hours was conducted. Present during the interview were Mr. Angeles Ramos and Mr. Fernando Reyes,

representing the United States Department of Housing and Urban Development Office - Fair Housing and Equal Opportunity Division. The interview began at approximately 11:00 a.m. where upon the complainants rights under the Title VIII Laws were discussed and also the reason for reopening the case. It was explained to the complainant that because she had introduced additional information the department had decided to reopen the case in order to review the case more throughtly. Also requested from the complainant was a new verified complaint and an affidavit with any additional information they had. This was submitted on June 15, 1982 (Tab D).

The complainant began by stating that on October 1979 she made her initial contact with the respondent, Mr. Sidney Clyburn (builder, Heritage Homes Inc.).

She stated she went to talk to the respondent because Mr. Cariker, an employee of Longview Savings and Loan had recommended the respondent to them.

She stated that she called the respondent and told him that Mr. Cariker had referred her to him and that she was interested in building a house and an appointment was thus set.

The first meeting, according to the complainant, was held at the respondents' house located on Hampshire Street in Longview, Texas. The complainant stated that she provided the respondent builder with blueprints of the house she wanted to build, since she had the prints drawn up at Moore Lumber Company prior to this first meeting. But, the complainant states that she never gave the respondent any specifications for the house nor were any specfications for the house ever

agreed upon. She did state that they did talk about what would go in the house but that it was merely talk since nothing was presented by the respondent in writing.

The complainant continued by stating that they had approximately three meetings and that it was around the third meeting in which the contract was signed, the date of this meeting was in November 28, 1979. The complainants stated that the respondent agreed to build for them a house at 1415 Lazy Lane in Longview, Texas to their desires and specifications. The complainant stated she later gave a $15,800.00 deposit to the respondent to build said dwelling.

The complainant states that construction of the house began around February 1980. Prior to the start of construction, however, the complainant stated she went to Longview Savings and

Loan to obtain a commitment letter for a permanent mortgage loan which was approved on the first of February 1980. The complainant states that around March of 1980 the concrete slab was started and work continued until the summer of 1980 and for some reason unknown to the complainant work was halted. She also alleged that after the signing of the contract she attempted to meet with the respondent to discuss the specifications but that she was never able to meet with him.

The complainant thus alleges that it was in September of 1980 that she began to realize that problems were going to arise out of this contract because each time she requested a particular item she was told that she would be charged extra for that item. According to the complainant, it was also around this time

that she noticed that other houses that the respondent was building for white owners, which started about the same time as hers, were nearing completion but that hers was not nearly completed.

In October of 1980, the complainant states that he began to try to intimidate her in not buying the house by first making some noticeable changes to the house without her consent. She stated that he painted the brick of the house even though the house called for non-painted brick. She stated that around this time she began receiving abusive phone calls and that someone was damaging her trucks.

The complainant stated that it was also in September that she found out that the respondent had submitted specifications to the Longview Savings and Loan without her consent or

agreement. She also alleged that changes were made to the house that were not on her blueprints. After realizing all these problems, she stated she contacted Longview Saving and Loan and told them of the problems she was having. She states she talked to Mr. Willis Clark who was the official handling the interium financing for the respondent. She states that Mr. Clark told her that he would discuss the problem with the respondent and get back to her. She states that Mr. Clark has to this date never returned her call.

The complainant states that the Saving and Loan did not help her in any way to try to solve the problem she was having with the respondent. The complainant also stated that she in no way delayed the respondent from building this house. The complainant submitted

receipts for items she had ordered which were to go into the house (Tab H). The complainant also provided receipts for the blueprints from Moore Lumber Company who drew up the blueprints (Tab H).

The complainant states that she was treated differently than a White because of her color, Black. The complainant's allegations are thus based on: (1) the amount of time it took to build her house as opposed to other units going up at approximately the same time as her's; (2) She alleges that the respondent purposely made changes to the house to discourage her from following through with the contract; (3) That he treated her differently by not meeting with her to discuss the specifications of the house; (4) That he intimidated her by painting the brick she had picked out without her consent thus hoping to discourage her

from purchasing the unit; (5) By harrassing her through the use of the Longview Police Department who on several occasions picked her up and arrested her based on information provided by the respondent; and (6) By using abusive and threatening phone calls and damaging of personal property.

The complainant thus concluded that she received a bill for $5,218.69 for the extras she says were included in her specifications that should have already been included. She states she had her attorney file a letter refusing to pay these extras plus the filing of a suit in court. The complainant ended by saying that she has never gone to court to decide who breached the contract.

Soon after January 14, 1980, the dirt work was begun, followed by the framing which was started the middle of

March. Several changes were requested by the complainant which were done at no cost to them. Also, the respondent stated that he was held up because the complainant refused to select tub colors. He also stated that she, on several occasions, insisted on being present during the performance of various jobs at the house all of which took time to do. The disagreements as to what would go in the house started when she told him that she wanted wood ceilings and that he told her that her plans did not call for that and there would be an extra charge for that job.

A meeting was set up on August 19, 1980, in which he told the complainants that he had bid the house by the specs that they brought and that he had shown them a house that was comparable to theirs and thus any extras would be at an

additional charge. He then stated he offered them their money back and let them out of the contract. He states that they did not want out of the contract but rather to figure how much the extra wood ceilings would cost. He then states he gave them a cost per room for material and labor. He states they offered the money in advance but that he told them that any extra put on would be paid after the work had been completed. They then were to call back their decision, which they did. They decided to add wood ceilings to the master bedroom, den, and living room and moldings to the other three bedrooms. It was agreed that the price of the ceilings was to be paid upon installation along with the other accumulated extras.

The respondent went on to say that after the arguing of the kitchen

cabinets, bathroom and ceilings at a cost of $1,800.00 he received a letter from Ms. Allen's attorney, stating that she would no longer pay for any extras and requested her money back plus attorney fees. He stated that at this point he had no choice but to file a breach contract suit against the complainant. He then proceeded to try to complete the house and put it on the market for sale to try to limit his damages from the breach of contract. During the last week of October he stated he had the painter paint the brick to try to make it a more saleable house.

The respondent continued by saying that the complainant harassed the workers by cursing them and ordering them off the property. He stated he sought police help. He states he was told by the police that before they could do anything

he or his wife, as owners of the property, had to catch the complainant on the property and order her off and to stay off. He states that the complainant on one occasion stopped in front of the house in question after recognizing his wife's car and told her to open the front door but that his wife was scared and only ordered her off the property; otherwise, she would have the police pick her up. He states that the complainant then called his wife "trash" and left after realizing that his wife would not open the door. The respondent stated that this incident was witnessed by several of his workers.

He also stated that the complainants returned later that evening, at which time he had the police arrest them for trespassing.

At the time of the trial, the

respondent stated the complainant did not show up, the trial was thus dismissed and the court said they had forfeited their bond. Later, according to the respondent, they received a call from the court saying that a retrial would be held since the complainant had shown up two hours late - to which they had said that their attorney had given them the wrong time. On the retrial, the respondent states that his wife was unable to be there because their son was sick thus the judge dismissed the charges (this according to the respondent) appears to have set the complainant "on fire." The next incident involved stealing of his signs. He stated that the complainant stole several Heritage Home signs from the property and he had the police arrest them for this.

He ended by stating that the

complainants harassed them and that the complainant from the start had never intented to pay for the house.

Witnesses for the Complainant:

Numerous witnesses were interviewed, and below is a summary of statements made by those witnesses:

Mr. Al Miller was interviewed on June 29, 1982, and submitted a statement on June 11, 1982 which was verified on June 29, 1982.

Mr. Al Miller stated that he has known the complainants for approximately five years. During the months of June and July 1980 he went with them to view the construction of their new home. He stated that during these visits he noticed many things that were wrong with the house. He states that he is by no means a builder but that the defects were obvious to any person. He also stated